No. 20756

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BRIDGE CORPORATION OF AMERICA,

Appellant,

vs.

THE AMERICAN CONTRACT BRIDGE LEAGUE, INC., *et al.*,

Appellees.

APPELLANT'S OPENING BRIEF.

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Statement Regarding Jurisdiction.

The Second Amended Complaint contains three causes of action. The jurisdictional basis of the first is 15 U.S.C. 1, 2, 15 (an Act to protect trade and commerce against unlawful restraints and monopolies), and 28 U.S.C. 1337. [Tr. p. 132.] Defendant, The American Contract Bridge League, Inc. (hereinafter called ACBL), conducts an interstate business. [Para. 8; Tr. p. 141.] The Relevant Market [Para. 12; Tr. p. 143] is the business of providing personnel and equipment for scoring sectional and regional duplicate bridge tournaments throughout the United States. Plaintiff Bridge Corporation of America began to conduct its business in interstate commerce. See Reporter's Transcript of proceedings, page 49, line 22 *et seq.*, containing offer to clarify complaint in this connection, should any doubt exist.

The second cause of action parallels the first but is based upon California Business and Professions Code, Sections 16700 to 16758, inclusive, commonly known as the Cartwright Act. [Tr. p. 146.] The basis of jurisdiction is diversity, 28 U.S.C. 1332. The matter in controversy is alleged to exceed the sum of ten thousand ($10,000) dollars, exclusive of interests and costs, and is alleged to exist between citizens of different states.

The third cause of action is for interference with prospective business advantage and is likewise based on the diversity statute, 28 U.S.C. 1332.

On December 16, 1965, the District Court granted defendants' motion to dismiss plaintiff's second amended complaint as to all counts. [Tr. p. 173.] On January 3, 1966, judgment was filed and entered [Tr. p. 175], dismissing the first cause of action for lack of subject matter jurisdiction, dismissing plaintiff's second and third causes of action for failure to state a claim upon which relief can be granted, and granting defendants' costs. Notice of appeal was filed January 14, 1966 [Tr. p. 177], appealing both from the order and from the judgment. Appellate jurisdiction is based upon 28 U.S.C. 1291.

Concise Statement of the Case.

The basic issue is what *types* of interstate commerce, if any, are exempted from the antitrust laws of the United States; what types of intrastate commerce, if any, are exempted from the Cartwright Act; and finally, as a matter of law, does the third cause of action *on its face* preclude plaintiff from trying before a jury unreasonableness of defendants' interference, etc. (*A jury trial has been demanded.* [Tr. p. 2.])

The memorandum opinion of the District Court is as follows:

> ". . . the conduct complained of does not constitute *the kind* of 'trade or commerce' contemplated by the Sherman Act, and although not previously discussed, for the same reasons it would appear that it does not constitute 'trade or commerce' as contemplated by the Cartwright Act. With reference to the plaintiff's third cause of action, the court has already *ruled* [found as a fact?] that the restriction as to the recording of master points is *reasonable and logical* under the circumstances, and is permissible." [Tr. pp. 173-174.] (Emphasis added.)

The issues are presented by virtue of the court's dismissal of all three causes of action without leave to amend.

Specification of Errors.

1. The District Court erred in holding that the conduct complained of does not constitute *the kind* of trade or commerce contemplated by the Sherman Act.

2. The District Court erred in holding that the conduct complained of does not constitute *the kind* of trade or commerce contemplated by the Cartwright Act.

3. The District Court erred in holding that the restrictions or restraints imposed upon commerce by defendants was reasonable and logical under the circumstances.

4. The District Court erred by improperly relying upon certain precedents.

5. The District Court erred because it failed to apply applicable precedents.

6. The District Court erred because it made a finding of fact, namely, reasonableness, and accordingly usurped the province of the jury.

7. The District Court thus erred in depriving plaintiff of its right of a jury trial.

8. The District Court erred because the conduct complained of is in fact a *per se* violation, namely, a group boycott, in which case reasonableness is no defense.

9. The District Court erred in granting defendants' motion to dismiss, and causing the judgment of January 3, 1966 to be filed and entered.

10. The District Court erred in dismissing the first cause of action for lack of subject matter jurisdiction.

11. The District Court erred in dismissing the second and third causes of action for failure to state a claim upon which relief can be granted.

12. The District Court erred in awarding costs to defendants.

ARGUMENT.

Introduction.

Some background information must be understood in order to relate the competitive positions of the parties.

It has been estimated that there are thirty-five million bridge players in the United States. Bridge is of two types: rubber bridge and tournament bridge. In rubber bridge the players themselves keep and total their scores, decide the winner, and pay and collect losses and winnings accordingly. There is no problem at all regarding the scoring of *rubber bridge* since scorekeeping is a matter of simple addition and subtraction.

Tournament bridge is conducted upon an entirely different basis. It involves the use of so-called duplicate boards. Whereas in rubber bridge the players throw their cards together in the center of the table as played, in tournament bridge the cards of the players are kept separate at all times so that the four sets of thirteen cards *as dealt* can be placed in pockets of a duplicate board and passed on to other tables for play by others. Each player simply turns his cards face down in front of him. A typical session of duplicate bridge involves playing 26 or 28 hands or "boards". Competition ordinarily is by pairs of players who play different boards against different pairs.

Scoring a duplicate bridge tournament is something altogether different from scoring rubber bridge, and is *not a mere matter of addition and subtraction.* The basis of *match point* scoring is to compare for each hand or board the results achieved by each pair with respect to those achieved by the others. Thus for each hand or "board" a pair receives one point for every pair

that it beats on a particular board and one-half point for every pair that it ties. See, for example, The International Code, Laws of Contract Bridge. [Tr. p. 137, line 12.] The match point scores achieved by the pairs on each of the 26 or 28 hands or boards are then cumulated, and the pair having the highest total of *match points* (not bridge points) wins.

"Match pointing" each of the numerous boards is a highly skilled art when done manually. Years of experience are required in order to gain proficiency.

It takes a substantial staff to tabulate the bridge scores during the tournament, and at its conclusion manipulate the bridge scores to assign match point values thereto. If there are six hundred tables in play, there may be as many as seventy or eighty people performing the task of tabulating, match pointing and cumulating.

The Role of the ACBL.

The defendant ACBL was organized as a nonprofit, non-stock New York corporation [Tr. p. 85 *et seq.*] presumably for the purpose of fostering the development of bridge throughout the United States. Its quite legitimate function was to devise some way of ranking about two hundred thousand duplicate bridge players and classifying them according to their achievements as Life Masters, Senior Masters, Junior Masters, etc. The ACBL itself conducts only three tournaments a year. But hundreds of thousands of tournaments are conducted each year by others. The problem arises, how can the credits for winning these various tournaments be as-

signed? Defendant ACBL devised the method of rating the various tournaments, and awarding "Rating Points". Thus the winning players are given "Rating Points" for winning all types of tournaments, and these awards are tabulated by an IBM machine in the New York offices of defendant ACBL. Lists are published periodically, and players thus achieve the Life Master, National Master, or other status presumably commensurate with their achievements. It must be noted that *plaintiff has no connection or interest whatsoever in how these credits are awarded.* Plaintiff's only interest is in performing the task of tabulating, match pointing and cumulating duplicate bridge tournaments, and *determining* the winners. What credits the winners are given is no concern of plaintiff. Whether the players are called Life Masters or Universal Masters is immaterial.

However, the credits are highly sought after. Bridge players travel throughout the country to attend the biggest tournaments so that they can amass the greatest number of credits and corresponding status. If these credits were not awarded, the players simply *would not participate.* Just how important the credits are is perhaps incomprehensible to one not caught up with the fever. However, in the New Yorker Magazine, September 8, 1956, Volume 32, page 72, at page 74, Alfred Sheinwold, the Los Angeles Times bridge columnist and internationally recognized expert, was quoted: "The master point is the be-all and end-all of tournament play." Without these credits, tournament bridge would

fall apart. The control of these awards by the ACBL and the power to withhold them is the immense tool used by the ACBL in carrying out its monopolistic practices.

How is bridge organized by the ACBL under its award system? The District Court in its first memorandum opinion [Tr. p. 128] stated:

> ". . . The League is the corporate combination of several hundred membership associations, or corporations, which plaintiff calls units, which are chartered by the League and are thereby given the exclusive right to conduct duplicate bridge tournaments in their particular areas."

The individual units have jurisdiction over the various privately owned duplicate clubs in their area, and these private duplicate clubs in turn are authorized to issue minor awards which figure in the award system. See Stoddard affidavit. [Tr. p. 100, line 25 *et seq.*] The three so-called National Tournaments conducted by the ACBL itself are traditionally held in the spring, summer and fall. Since these are conducted by the defendant ACBL itself, plaintiff concedes at this time that the ACBL itself can for these tournaments choose just what means it will use to convert bridge scores to match points, etc. But large and important tournaments, namely, regional and sectional tournaments, are run by the *units themselves* or groups of units under *their own management*. Large sectional and regional tournaments are normally scheduled during the weekends, and many such sectional and regional tournaments are simultaneously scheduled in various places throughout the United States. Local sectional, regional and national tourna-

ments are defined in the Second Amended Complaint. [Tr. p. 134, line 11 *et seq.*]

Yet the defendant ACBL is not content with confining its business activities to the recording of the awards and the running of its three National Tournaments a year as set forth in its charter. [Tr. p. 85.] Instead, it pervades every facet of the business conducted by the units and provides supplies, equipment, trophies and numerous other goods and services for all bridge activities in the United States, and as more particularly set forth in paragraph 5 of the Second Amended Complaint. [Tr. p. 135 *et seq.*] The nature of its activities may be partially appreciated by a consideration of its six-months statement [Ex. C appended to the Affidavit of Fred Flam; Tr. pp. 126-127.]

The Plaintiff's Business.

Aware of the growth of tournament bridge and aware of the immense problems of tabulating bridge scores, converting them to match points, etc., plaintiff developed a specialized digital computer and accompanying paraphernalia (hereinafter called "computer") [see Ex. A; Tr. p. 46] designed to compute, calculate and record the match points. [Para. 3 of Amended Complaint; Tr. p. 133.] Thus with the aid of plaintiff's equipment, all that is necessary is to feed into the machine the *bridge* scores, and the product of the machine is the cumulated *match point* score of all of the plays *printed out in the order of finish.*

Bearing in mind the great mass of data involved, the feat performed by this specialized computer is truly phenomenal. The total investment in the computer to the date of filing of the complaint is fifty-nine thousand

one hundred thirty-three dollars and sixty-eight cents ($59,133.68). See paragraph 30, Second Amended Complaint. [Tr. p. 150.] About April 1963, the computer was completed and field tested, and demonstrated to various units. Plaintiff then offered and now offers the service of scoring duplicate bridge tournaments at a certain fixed fee per table. The first arrangement was concluded with the Riverside-Redlands units for their sectional to be conducted November 1, 2 and 3 of 1963. See Second Amended Complaint, paragraph 27. [Tr. p. 148.] Paragraph 28 of the Second Amended Complaint is here repeated:

> "28. Plaintiff is informed and believes, and upon said information and belief alleges that during or about the month of August, 1963, and prior to September 1, 1963, League and Landy, without justification, wrongfully and maliciously interfered with and prevented said prospective profitable business relationships and advantages to plaintiff by, among other things, unjustifiably, unlawfully and maliciously preventing the consummation of the said reasonably expected business relationships and the contract then anticipated between the manager and directors of the said Riverside-Redlands Duplicate Bridge Tournament, and plaintiff, by advising and directing the said directors and managers that they could not contract with plaintiff for the use of its said digital computer, and that if they did contract with plaintiff for the use of said digital computer and use the same, that League would not record or score the master points of the competitors who competed in said tournament.
>
> "Upon receiving said advice and direction, the said tournament managers and directors declined

to use the said digital computer in the scoring of the match points at the said tournament, although otherwise, the said manager and directors approved the said computer, believed that it was satisfactory in every way, and was extremely valuable to them, and would have used the same."

Defendants made clear to all concerned that should any organization utilize plaintiff's specialized digital computer, no awards would be given. The award system being what it is, and virtually all tournament bridge being subject to the award system of the ACBL, plaintiff's business was then and there laid to rest. Yet plaintiff is ready willing and able to carry out its business. [Tr. p. 9, line 27 *et seq.*]

Subject Matter Jurisdiction.

Plaintiff's first cause of action was dismissed because of "lack of jurisdiction over the subject matter", not that it failed to state a claim upon which relief can be granted. The subject matter of the first cause of action is interstate commerce, both the interstate commerce of plaintiff and the interstate commerce of defendant ACBL. Moreover, jurisdiction was properly pleaded under the applicable sections of the antitrust laws of the United States. To affirm the lower court would seem to be tantamount to a holding that the laws of Congress create rights without remedies, and that 28 U.S.C. 1337 is a nullity.

A somewhat analogous situation was presented in *Spohn v. United States* (D.C.S.D. N.Y. 1954), 16 F.R.D. 240. The plaintiff invoked the Federal Tort Claims Act, and defendant moved to dismiss for lack

of jurisdiction over the subject matter. At page 241, the court stated:

> "I feel that it is highly undesirable, if not impossible, to rule upon such a question in the absence of sufficient facts. As the court said in Montgomery Ward & Co. v. Schumacher, D.C., 3 F.R.D. 368, 370, involving a similar motion:
>
> > '* * * the Court should have open to it a wider vista than presented within the four corners of the pleadings, before determining the important question as to whether the plaintiff shall stay in court or not.'
>
> "The court there deferred the ruling on the motion to dismiss until the facts should be before it, pursuant to Rule 12(d). Cf. Hawn v. American S.S. Co., D.C., 26 F.Supp. 428; Kaus v. Huston, D.C., 35 F.Supp. 327; Equitable Life Assurance Society of United States v. Kit, D.C., 26 F.Supp. 880."

The only commerce not within the antitrust laws are baseball and those specifically exempted such as by the statute itself. (15 U.S.C. 17.) Moreover, this is not a "baseball" case.

The Kind of Commerce Congress Had in Mind.

The commerce of plaintiff is the advertising of plaintiff's services by the use of interstate publications, by the aid of the mails and otherwise, the transportation of plaintiff's digital computer and other paraphernalia across the borders of the several states to the sites of the various tournaments, and the performance of services at the sites of various tournaments in the several states of the United States.

True enough, this type of business may not have been "specifically" contemplated by Congress when it enacted the antitrust laws. (But was airmail contemplated by the constitutional framers when the post office was established?) Surely because plaintiff's commerce is in the nature of a service does not exempt it from the classification of a trade within the purview of the antitrust laws. In *United States v. National Association of Real Estate Boards*, 339 U.S. 485, at page 490 Mr. Justice Douglas stated:

> ". . . The fact that the business involves the sale of personal services rather than commodities does not take it out of the category of 'trade' within the meaning of §3 of the Act. The Act was aimed at combinations organized and directed to control of the market by suppression of competition 'in the marketing of goods and services.' "

See also *United States v. Shubert*, 348 U.S. 222. Chief Justice Warren framed the issue thus, at page 226:

> ". . . The question presented is thus a narrow one: whether the business of producing, booking, and presenting legitimate attractions on a multistate basis constitutes 'trade or commerce' that is 'among the several States' within the meaning of those terms in the Sherman Act."

After citing and discussing a number of cases, Mr. Justice Warren stated, at page 226:

> "These decisions, apart from Federal Base Ball and Toolson, make it clear beyond question that the allegations of the Government's complaint bring the defendants within the scope of the Sherman Act, even though the actual performance of a legitimate stage attraction 'is of course a local affair.' "

Accordingly, whether or not actual playing of duplicate bridge may be a local affair, selling playing cards surely isn't, nor is the interstate business of providing personnel and equipment for performing the intricate task of converting bridge scores to match points.

In *United States v. E. I. du Pont de Nemours and Company*, 351 U.S. 377, Mr. Justice Reed at page 385 stated:

> "The Sherman Act has received long and careful application by this Court to achieve for the Nation the freedom of enterprise from monopoly or restraint envisaged by the Congress that passed the Act in 1890. Because the Act is couched in broad terms, *it is adaptable to the changing types of commercial production and distribution that have evolved since its passage.* Chief Justice Hughes wrote for the Court that 'As a charter of freedom, the act has a generality and adaptability comparable to that found to be desirable in constitutional provisions.' " (Emphasis added.)

Whether or not this is a case of first impression [Memo. Opinion; Tr. p. 129], the lower court's holding that this type of commerce is not within the purview of the antitrust laws would seem to be "judicial legislation".

Improper Precedents.

Defendants have heavily relied upon *Apex Hosiery Co. v. Leader*, 310 U.S. 469, to establish that the restraint in question is not the type contemplated by the Sherman Act. Defendants have relied heavily upon *Lieberthal v. North Country Lanes, Inc.* (2 C.A. 1964), 332 F. 2d 269; and *Page v. Work* (9 C.A. 1961), 290

F. 2d 323, for the proposition that only intrastate commerce is involved.

The well-known *Apex Hosiery* case involved a suit by a hosiery company against a union. The hosiery company claimed that the union committed serious *trespasses* resulting in a plant shut-down, with consequent "restraint" of interstate commerce. This case is easily distinguishable. Thus it is one thing physically to interfere with the flow of goods in commerce by typical tortious conduct, and it is quite another to interfere with the free interplay of *market forces*. It is the free interplay of *market forces* which concerns the Sherman Act, not physical trespasses. If plaintiff were complaining that the defendants came to the place of business of plaintiff and mutilated plaintiff's equipment, *Apex* might apply. But that is not the case. Plaintiff is complaining that the defendants have interfered with the free interplay of *market forces* involving the plaintiff's goods or services and, accordingly, the Sherman Act does apply; *Apex* is of no consequence.

Page v. Work and *Lieberthal v. North Country Lanes* are clearly distinguishable. In *Page v. Work*, the only commerce involved was the publication of a legal newspaper in Los Angeles County. The interstate incidents of the publication of this newspaper in Los Angeles County were entirely inconsequential. Accordingly, the court properly concluded that the commerce involved was intrastate, not interstate.

In *Lieberthal*, the court held, at page 271:

> "The operation of bowling alleys, *without more*, must be held to be a wholly intrastate activity." (Emphasis added.)

In the present case there *is more*; plaintiff has designed its digital computer and accompanying paraphernalia for the specific purpose of servicing sectional and regional tournaments *throughout the United States* wherever they may be held. This surely contrasts with *Lieberthal.*

The District Court misplaced reliance on *Molinas v. National Basketball Association* (D.C.S.D. N.Y. 1961), 190 F. Supp. 241. This case is distinguishable at the outset because there *was a trial on the merits* and a determination of the factual issue as to whether or not a certain course of conduct of the defendants was reasonable. In the *Molinas* case, the court stated, at page 245:

> "Thus it is apparent that the plaintiff has not *presented sufficient proof* to make out a claim upon which relief may be granted." (Emphasis added.)

If one is to follow the *Molinas* case, at least the plaintiff should be allowed the opportunity of presenting proof. In passing, it may be noted that the court found reasonable its rule to suspend players who had placed wagers on games in which they had participated. And the court found that it was absolutely necessary (clear business purpose) for the preservation of the sport of basketball to prohibit such conduct. Obviously the future of tournament bridge is not at stake by substituting machine scoring for hand scoring methods. Duplicate bridge will continue. Track meets continue despite the substitution of new computerized timing devices.

Local Application of Pressure.

It is submitted that by promulgating its edict to refuse awards, the defendants applied the restraint throughout the entire area of the United States and thus in interstate commerce. But if one were to consider only the application of pressure as it pertains to the Riverside and Redlands units, then a case of restraint of interstate commerce yet exists. See *United States v. Women's Sportswear Mfg. Ass'n*, 336 U.S. 460, at page 464:

> "The trial court appears to have dismissed the case chiefly on the ground that the accused Association and its members were not themselves engaged in interstate commerce. This may or may not be the nature of their operation considered alone, but it does not matter. Restraints, to be effective, do not have to be applied all along the line of movement of interstate commerce. The source of the restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. *If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.*" (Emphasis added.)

ACBL — a Trade Association.

The relationship of the several hundred units to the American Contract Bridge League is that of members in a trade association. Yet the defendants have argued that the various units are part and parcel of the national organization, and that there is but one conglomerate

whole. But we must accept the District Court's opinion [Tr. p. 128]:

> ". . . The League is the corporate combination of several hundred membership associations, or corporations, which plaintiff calls units, which are chartered by the League and are thereby given the exclusive right to conduct duplicate bridge tournaments in their particular areas."

The ACBL merely *suggests* a form of government of the several hundred units. [Tr. p. 120.] Proposed By-Laws incorporate the following significant provisions [Tr. p. 123]:

> "8. *Power and Duties*
>
> In addition to the powers granted by other provisions of these By-Laws and by the Laws of the State of ....., the Board of Directors shall have the following powers and duties:
>
> (a) To acquire, hold, administer, maintain and dispose of all the property of the Unit;
>
> (b) To appropriate the funds of the Unit for the purpose set forth in these By-Laws;
>
> (c) To hire and discharge employees and to supervise their conduct and to fix their compensation;
>
> (d) To audit all receipts and disbursements of the Unit;
>
> (e) To conduct, manage, supervise and control all of the business of the Unit included in but not limited to, the conduct of tournaments, the selection of all dates and locations for holding such tournaments and the making of all contracts in connection therewith;"

Also significant is the fact that the ACBL disclaims any interest in property of the units. See Report of Tom Stoddard [Tr. p. 125]:

> ". . . The important thing for the Unit to report is the worth of the Unit. * * * The League is not going to tax or assess any Unit or take any of thi money; or in any way interfere with the Units. * * * Some Units have the impression that the League plans to do something to the Units. But nothing could be further from the truth."

The several units are thus individual members of a trade association bound together by the award system. This is a classic situation of a group boycott, and hence a *per se* violation.

The testing ground for the plaintiff's service of scoring duplicate bridge tournaments is the marketplace, such as performing its contract with the Riverside and Redlands units. Plaintiff's existence should be determined according to pricing, efficiency, service, and the judgment of satisfied customers such as the Riverside and Redlands units, and all in accordance with the free interplay of *market forces*. But the several hundred units of the ACBL, acting in accordance with the edict of the ACBL, have prevented these market forces from coming into play *at all*, by agreeing that the digital computer and paraphernalia such as provided by plaintiff cannot be used if awards are to be given.

Group Boycotts and the Law.

In *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 at page 212 the court stated:

> "Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they 'fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality.' Fashion Originators' Guild v. Federal Trade Commission, 312 U.S. 457, 466, 467-468, 61 S.Ct. 703, 707, 85 L.Ed. 949. Cf. United States v. Trenton Potteries Co., 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700. . . .
>
> "Plainly the allegations of this complaint disclose such a boycott. This is not a case of a single trader refusing to deal with another, nor even of a manufacturer and a dealer agreeing to an exclusive distributorship. Alleged in this complaint is a wide combination consisting of manufacturers, distributors and a retailer. This combination takes from Klor's its freedom to buy appliances in an open competitive market and drives it out of business as a dealer in the defendants' products. It deprives the manufacturers and distributors of their freedom to sell to Klor's at the same prices and conditions made available to Broadway-Hale and in some instances forbids them from selling to it on any terms whatsoever. It interferes with the natural flow of interstate commerce. It clearly has, by its 'nature' and 'character,' a 'monopolistic tendency.' As such it is not to be tolerated merely because the

victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups. In recognition of this fact the Sherman Act has consistently been read to forbid all contracts and combinations 'which "tend to create a monopoly,"' whether 'the tendency is a creeping one' or 'one that proceeds at full gallop.' International Salt Co. v. United States, 332 U.S. 392, 396, 68 S. Ct. 12, 15, 92 L. Ed. 20."

Monopoly in Its Broader Aspects.

In *Breier v. Northern California Bowling Proprietors' Assoc.*, 316 F. 2d 787, plaintiffs alleged that they were bowling operators in San Francisco. They sued some of their competitors and a national bowling proprietors' association alleging that the latter had violated the Sherman Act (Sections 1 and 15) by the following scheme and overt acts: Prices and rules were established for the bowling alleys that were members of the defendant association. Plaintiffs were not members and did not abide by the rules and prices. Defendant was alleged then to have *excluded customers of the non-member alleys from the tournaments organized by the defendant bowling association.* The analogy to our case seems complete. Two District Courts granted motions to dismiss the Complaint and appeals were taken. While the question of the right to amend forms a substantial portion of the opinion, the substantive issue became involved because the District Courts had ruled that since no cause of action was stated, no amendment should be

permitted. The Court of Appeals for the Ninth Circuit unanimously held in an opinion written by Circuit Judge Browning that the Complaint properly alleged the impact upon interstate commerce in equipment, appointments and furnishings used in the construction and maintenance of bowling establishments, in bowling pins and balls used in daily operations of these establishments, in balls, bags and shoes which they sell to bowlers and *upon an interstate network of tournaments organized and conducted by defendant.* (316 F. 2d at 790.) It is clear that these elements of the interstate commerce were not the acts in interstate commerce complained of and it is clear from the *Breier* case that there were two inquiries: (1) Is the defendant in interstate commerce, and (2) Has there been a combination and conspiracy to eliminate competition or an attempt to monopolize or a monopolization of trade and commerce or a restraint of trade and commerce, all as forbidden by the Sherman Act and as alleged in paragraphs 9, 10, 11 and 12 of the Second Amended Complaint here.

If *Breier* is any precedent at all, the District Court must be reversed.

Reasonableness.

It may be that the "danger" contemplated by the defendant ACBL is that by the aid of plaintiff's specialized digital computer and accompanying paraphernalia, the monumental task of match pointing, cumulating and ranking is done at a fraction of prior cost; that plaintiff has a competitive advantage as against manual scorers whom defendant ACBL controls and from whom defendant ACBL receives tribute. One cannot justify defendants' boycott on the grounds that it preserves the

status quo against the inroads of advancing technology. Those vigorous enough to employ the new tools of automation should be allowed free access to the marketplace.

In *American Federation of Tobacco Growers, Inc. v. Neal, et al.* (4 C.A. 1950), 183 F.2d 869, the trade association attempted to justify its refusal to admit plaintiff to membership on the grounds that the proposed member had a competitive advantage in not being subject to city taxes. The court had little difficulty holding that an actionable restraint of trade was involved. At page 873, the court stated:

> "As to the contention that the restraint of trade here involved was a reasonable one, it is a sufficient answer that the effect of the action of the defendants was to exclude a competitor from a substantial market in interstate commerce; and it is well settled that such exclusion is unreasonable per se. 'The purpose of the anti-trust laws — an intendment to secure equality of opportunity — is thwarted if group-power is utilized to eliminate a competitor who is equipped to compete'. William Goldman Theatres v. Loew's, Inc., 3 Cir., 150 F. 2d 738, 743. 'Not only is price fixing unreasonable, per se, * * * but also it is unreasonable, per se, to foreclose competitors from any substantial market.' International Salt Co. v. United States, 332 U.S. 392, 396, 68 S.Ct. 12, 15, 92 L.Ed. 20; Fashion Originators Guild v. Federal Trade Comm., 2 Cir., 114 F.2d 80, affirmed 312 U.S. 457, 61 S. Ct. 703, 85 L.Ed. 949. 'The anti-trust laws are as much violated by the prevention of competition as by its destruction * * *. It follows a fortiori

that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful.' United States v. Griffith, 334 U.S. 100, 107, 68 S.Ct. 941, 945, 92 L.Ed. 1236. See also Fashion Originators Guild v. Federal Trade Comm., 312 U.S. 457, 668, 61 S.Ct. 703, 85 L.Ed. 949; American Medical Ass'n v. United States, 317 U.S. 519, 63 S.Ct. 326, 87 L.Ed. 434."

Even if the trier of facts determines that the several hundred units of the ACBL are part and parcel of the defendant corporation (which they are not), then plaintiff should be allowed to show the monopolistic position of the defendants, the lack of legitimate business interest and the unreasonableness of their action in excluding plaintiff from the marketplace. One would think that unreasonableness is a question of fact for the jury. The Laws of Duplicate Contract Bridge, promulgated and published under the auspices of the American Contract Bridge League and referred to in the Second Amended Complaint at page 5, line 11 [Tr. p. 137], the following provisions are pertinent:

"95. SPONSORING ORGANIZATION

"Any organization [*i.e.*, the UNITS] may sponsor events or tournaments conducted under these Laws. The Sponsoring Organization has the following duties and powers:

"(a) to appoint the Tournament Director. If there is no nonplaying Tournament Director, the players should designate one of their own number to perform his functions."

"77. DUTIES OF OFFICIAL SCORER

"The Director is responsible for tabulating scores and records, but he may appoint one or more scoring assistants to perform these duties duties under his supervision.

"The duties of the Director or his scoring assistants include: preparing an Official Score, which sets forth each contestant's score for each board and his score and rank for the session and for the event; posting the Official Score, as promptly and as conspicuously as possible, for the inspection of the players; examining the scores recorded by the players; correcting scores that are patently incorrect, and returning for verification or correction scores that may be incorrect.

"78. PROCESS OF RECORDING SCORES

"At the conclusion of play on each board, the North player calculates the points scored, and records the score on the form provided for that purpose, including the following information:

"(a) the number of the board played, and the position and identifying number of each pair (or, in an individual contest, of each player);

"(b) the contract, indicating doubled or redoubled if applicable;

"(c) the declarer (North, South, East or West);

"(d) the points scored, and the side that scored them;

"(e) any other items required by the scoring form."

"81. TABULATION OF MATCH-POINTS IN PAIR OR INDIVIDUAL PLAY

"Scores are tabulated in such manner that all scores made on the same board in the same direction (North-South or East-West) may be compared together. Considering only scores made by other pairs on the same board in the same direction, the Director awards to each score ½ match-point for each other score identical with it, and 1 match-point for each lower score. When an adjusted score is awarded, each other contestant playing the same board in the same direction is awarded ½ match-point for his comparison with the adjusted score."

"97. GENERAL RESPONSIBILITIES

"The Director is the official representative of the Sponsoring Organization. He is responsible for technical management of the tournament. He is bound by these Laws and by supplementary regulations announced by the Sponsoring Organization. His duties and powers including the following:

* * *

"(h) to collect scores and tabulate results.

"(i) to report results to the Sponsoring Organization for official record."

The plaintiff should be allowed to prove that *it complies* with each and every one of the Laws of Duplicate Contract Bridge as promulgated by the American Contract Bridge League. If so, the trier of facts might conclude that it would be unreasonable to exclude plaintiff from the marketplace.

Plaintiff should be entitled to show many, many facts bearing upon the unreasonableness of the action of the ACBL in excluding plaintiff from competition. Perhaps plaintiff can prove that the technical consultant for the ACBL itself first expressed interest and contacted plaintiff to inquire about its activities; that before the plaintiff's substantial investment was made, it was encouraged by the technical consultant of the ACBL and others connected with it to build and complete the machine; that a National Tournament director on the payroll of the ACBL consulted with and was paid by plaintiff in order to ensure compliance with the requirements of the ACBL; that defendant ACBL accepted advertising of plaintiff's services in a publication distributed throughout the eleven Western states, Alaska and Hawaii; that after plaintiff's computer was built and successfully tested, the defendant ACBL weakly protested that it would make inroads into the business of providing supplies and personnel for conducting duplicate bridge tournaments; and that the ACBL itself attempted to score duplicate bridge tournaments by computer methods, but failed due to the cost factor. After such evidence is adduced, one might well conclude that the exclusion of plaintiff from commerce under its unofficial rule is nothing more than a poorly veiled attempt to exclude competition until the defendant ACBL itself has perfected a computer to force on the several hundred "autonomous" units of the ACBL, fix prices, exclude competition, and gain profits through monopolistic control.

Plaintiff is not insisting that the several hundred units contract with plaintiff. All plaintiff is insisting upon is its right to offer its goods and services to the

units, with the *possibility* of entering into contracts for scoring duplicate bridge tournaments. Whether these several hundred units contract with plaintiff or not is the business of the units and the plaintiff. But defendants stould not interfere with the bargaining processes and the forces of a free market.

The Public Interest.

It is believed that this court must bear in mind the public interest that would be undermined should the decision of this District Court be affirmed. Plaintiff is able to provide the service of converting bridge points to master points, tabulating, cumulating them, and placing the competitors in the order of finish, all at a fraction of the cost as compared to present-day methods. The hundreds of thousands of competitors in duplicate bridge tournaments pay for these services, if not directly, then indirectly, by their card fees. Since the monumental task of manipulating this voluminous data can be handled less expensively by plaintiff, then the entrance fees charged to the players should be correspondingly reduced. Millions of dollars are spent by bridge players. See, for example, Charles Goren's article in McCall's Magazine for March, 1962, Volume 82, page 46. Affirming the District Court's judgment must necessarily take its toll on the captive bridge playing public.

The Cartwright Act.

The second count of the Second Amended Complaint sets forth a cause of action under the Cartwright Act. The Cartwright Act contemplates trade and commerce connected with the supply of services just as much as it

contemplates trade and commerce connected with physical goods. *Babcock v. Crafts 20 Big Shows, Inc.*, 173 Cal. App. 2d 58, 342 P. 2d 974, involved the business of booking carnival-type events for use in conjunction with store openings, etc.

It is not seen where the Cartwright Act should be any more limited in scope than the antitrust laws of the United States. California courts have typically relied upon Federal cases (*Babcock, supra*), and the parallel to the Sherman Act is obvious. See cases cited by defendant [Tr. p. 168]: *Shasta Douglas Oil Co. v. Worth* (1963), 212 Cal. App. 2d 618, 624-625; *Associated Plumbing Contractors v. Spencer & Son, Inc.* (1963), 213 Cal. App. 2d 1. Whether contemplated or not at the time of the passage of the Cartwright Act, all intrastate commerce should come within its purview.

Interference With Prospective Economic Advantage.

The doctrine of *Temperton v. Russell*, 1 Q.B. 715 (1893), declared the principle that liability for interference with contracts extends to prospective or potential contracts. This rule has been followed in the United States and is Hornbook Law.

The Restatement of Torts sets forth the general rule in Section 766 as follows:

> ". . . one who, without a privilege to do so, induces or otherwise purposely causes a third person not to
>
> "(a) perform a contract with another, or
>
> "(b) enter into or continue a business relation with another
>
> is liable to the other for the harm caused thereby."

This section was quoted with approval in *Guillory v. Godfrey,* 134 Cal. App. 2d 628, 286 P. 2d 474, at page 477:

> ". . . It is said that 'wrongful or malicious interference with the formation of a contract or the right to pursue a lawful business, calling, trade, or occupation has been generally held to constitute a tort, ***.' 86 C.J.S., Torts, §43, page 956. This rule prevails in California. Finney v. Lockhart, 35 Cal.2d 161, 217 P.2d 19; Masoni v. Board of Trade of San Francisco, 119 Cal.App.2d 738, 741-742, 260 P.2d 205; Remillard-Dandini Co. v. Dandini, 46 Cal.App.2d 678, 680, 116 P.2d 641; California Grape Control Board v. California Produce Corp., 4 Cal.App.2d 242, 244, 40 P.2d 846; See, also, Restatement of Torts, §766, p. 49; 62 C.J. §53, p. 1137."

The court passed final judgment on this common law count *without so much as pointing out any defect in pleading.* If there is such a tort as interference with contractual relationships, the judgment must be reversed.

The Policy Regarding Motions to Dismiss.

The judgment of dismissal for lack of jurisdiction over the subject matter should not be sustained on the ground that the first cause of action fails to state a claim upon which relief can be granted. In *Corsican Productions v. Pitchess* (9 C.A. 1964), 338 F. 2d 441, Circuit Judge Browning stated, at page 442:

> "'[T]he accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears *beyond doubt* that the plaintiff can prove no set of facts in support of his claim which

would entitle him to relief' (Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed. 2d 80 (1957)) '* * * precludes dismissal for insufficiency of the complaint except in the extraordinary case where the pleader makes allegations which show on the face of the complaint some *insuperable bar* to relief.' Wright, Federal Courts 250 (1963)." (Emphasis added.)

In *Bolick-Gillman Company v. Continental Baking Company* (9 C.A. 1960), 278 F. 2d 649, the court considered a private treble damage suit dismissed in the lower court on the basis of failure to state a claim. The court stated, at page 650:

> "It cannot be said, however, that it 'appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' Conley v. Gibson, 1957, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L. Ed. 2d 80. Dismissal of the action upon this pleading was not warranted. See 2 Moore, Federal Practice, §1218 (2d Edition, 1948).
>
> "Reversed and remanded with instructions that the order dismissing the complaint with prejudice be set aside and for further proceedings."

It hardly requires a citation of authorities to support the proposition that a motion to dismiss for failure to state a claim is unfavored, and that all doubts must be resolved in plaintiff's favor.

Conclusion.

It is submitted that the District Court usurped the province of the jury and decided factual issues without benefit of trial. It is submitted that there is clearly subject matter jurisdiction for the first cause of action whether this is a case of first impression or not. It is submitted that the proper testing ground for the plaintiff's business is the marketplace, and that, consistent with the historical policy of the law, defendants ought not interfere with the free play of market forces. It is submitted that the complaint states causes of action under the antitrust laws of the United States, the Cartwright Act, and under the common law regarding interference with prospective economic advantage. It is submitted that the issues of group boycott, reasonableness and the like should be decided by a trial on the merits, and that plaintiff should have its day in court.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FRED FLAM.